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January 24, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearings

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Case Number: TSO-0203

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX ("the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual is not at this time sufficiently rehabilitated and reformed to the point where I can recommend that his access authorization might be restored.

I. APPLICABLE REGULATIONS

The regulations governing an individual's eligibility for access authorization (also "security clearance") are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id. See generally Department of the Navy v. Egan*, 484 U.S. 518, 531 (1988) ("the 'clearly consistent with the interests of national security' test indicates that 'security-clearance determinations should err, if they must, on the side of denials'"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990) (strong presumption against the issuance of a security clearance).

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. 10 C.F.R. § 710.21(b)(3). The burden is on the individual to present testimony or evidence to demonstrate that he is eligible for access authorization, i.e., that

access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(a).

On November 8, 2004, the DOE notified the Individual that it had derogatory information that created a substantial doubt as to the Individual's continued eligibility for an access authorization under 10 C.F.R. § 710.8, paragraph (j).¹ *Notification Letter dated November 8, 2004.* The Letter also advised the Individual of his right to request a hearing in the matter, and he did so in a letter dated November 24, 2004. *Letter from the Individual dated November 24, 2004.* The DOE forwarded the request for a hearing to the Office of Hearings and Appeals (OHA) and I was appointed to serve as Hearing Officer.

II. BACKGROUND

The Individual is employed by a contractor at a DOE facility in a position that requires an access authorization. Material concerning the Individual's alcohol consumption came into the possession of DOE. To try to resolve the questions raised by the material, the Individual was interviewed by a personnel security specialist on May 4, 2004, and then by a DOE-sponsored psychiatrist on June 4, 2004. The psychiatrist's report and the November 8, 2004, Notification Letter state that the Individual is "a user of alcohol habitually to excess."

The Notification Letter also cites a number of past events related to the Individual's alcohol consumption: A 1990 citation for having an "Open Container" while driving, a 1991 disciplinary action under the Uniform Code of Military Justice for underage drinking, a 1992 arrest for driving under the influence of alcohol and a consequent requirement that the Individual attend outpatient alcohol treatment. *Notification Letter* Save for the Open Container citation – the Individual maintains that alcohol was not involved -- these events are not disputed by the Individual.

For the June 4, 2004, interview, DOE asked the psychiatrist to address four questions:

- a. Has the subject been or is the subject a user of alcohol habitually to excess or is he alcohol dependent or suffering from alcohol abuse?
- b. If so, is there adequate evidence of rehabilitation or reformation?
- c. If not rehabilitated or reformed, what length of time and type of treatment would be necessary for adequate evidence of rehabilitation or reformation?

¹ (j) Been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist or a licensed clinical psychologist as alcohol dependent or as suffering from alcohol abuse.

- d. Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability?

Psychiatrist Report, June 25, 2004.

Based upon the Individual's history and present usage, the psychiatrist concluded that the Individual "*has been* but is not currently suffering from alcohol abuse." *Psychiatrist Report at 23* (emphasis supplied). However, the psychiatrist also concluded that the Individual is a user of "alcohol habitually to excess." *Psychiatrist Report at 23*. In response to the second question, the doctor concluded that there was not adequate evidence of rehabilitation or reformation. *Psychiatrist Report at 23*.

In response to c, the psychiatrist stated that for adequate evidence of rehabilitation or reformation, the Individual could do one of the following:

- (1) Produce documented evidence of attendance at Alcoholics Anonymous for a minimum of 100 hours with a sponsor, at least once a week, for a minimum of one year and be completely abstinent from alcohol and all non-prescribed controlled substances for a minimum of 1 year following the completion of (the AA) program = 2 years of sobriety.
- (2) Satisfactorily complete a minimum of 50 hours of a professionally led, substance abuse treatment program, for a minimum of 6 months, including what is called "aftercare" and be completely abstinent from alcohol and all non-prescribed controlled substances for a minimum of 1 ½ years following the completion of this program = 2 years of sobriety.

As adequate evidence of reformation there are two alternatives:

- (1) If the (Individual) goes through one of the two rehabilitation programs listed above, then (a total of) 2 years of absolute sobriety would be necessary to show adequate evidence of reformation.
- (2) If the subject does not go through one of the two rehabilitation programs listed above, then 5 years of absolute sobriety would be necessary to show adequate evidence of reformation.

Psychiatrist Report at 24.

Responding to the final question above – "Does the subject have an illness or mental condition which causes, or may cause, a significant defect in judgment or reliability" – the psychiatrist stated that "Although drinking habitually to excess is

a potential security concern, it is not an illness, as it is not in the DSM-IV TR² . . . (T)herefore, the answer is 'NO.' " *Psychiatrist Report at 25.*

In sum, the DOE-sponsored psychiatrist concludes that the Individual "has been and is a user of alcohol habitually to excess and is not showing adequate evidence of rehabilitation or reformation." *Psychiatrist Report at 28 .*

In response the Individual pointed out that the three alcohol-related events recited in the Notification Letter occurred in the distant past when he was very young, i.e., 17, 18 and 19 years of age, respectively. *November 20, 2004, letter (Exhibit 2)* He also pointed out that in the ensuing dozen years since those events, there have been no further incidents. Moreover, during the same period the Individual has made significant strides forward in terms of education, professional and personal responsibility. He has a family, he has worked continuously in progressively more responsible professional positions and has -- during evenings and weekends -- earned a Bachelor's degree in Political Science and a very high grade point average, and is on the verge of a second BA. *November 20, 2004 letter at 2-3.*

There is no substantial dispute as to any of the facts described above.

III. THE HEARING

Attending the Hearing were the Individual, DOE Counsel and the DOE-sponsored psychiatrist. There were three witnesses on behalf of the Individual, including the Individual's spouse. Witnesses would ordinarily be excluded from any portion of a hearing in which they were not testifying. In the interests of the Individual, however, the DOE psychiatrist was allowed to remain present during the entire Hearing in order to receive any information that might lead to a revision of the doctor's initial opinion. Because the Individual was not represented by counsel, DOE Counsel assisted in qualifying and examining each witness.

On behalf of DOE, Counsel briefly outlined the historical matters involved in the Notification Letter. Counsel framed the DOE interest as whether the Individual "has demonstrated . . . adequate evidence of reformation or rehabilitation in light of (the) diagnosis of (the Individual's) use of alcohol to excess." *Transcript of November 15, 2005 Hearing (Tr) at 9.*

On his own behalf, the Individual testified that beginning in May, 2005, he had completely abstained from alcohol. In June, 2005 he voluntarily entered into a professionally administered, bi-weekly outpatient treatment program for

² *The Diagnostic and Statistical Manual of the American Psychiatric Association, IVth Edition TR.*

substance abuse/dependence. Records provided by the Individual after the Hearing confirm his enrollment and completion of that program. *December 7, 2005 letter and attachments from Individual*. The Individual also testified that he did not have the benefit of the DOE-sponsored psychiatrist's report until December 2004 and did not understand that the recommendations of that report were "what the Department of Energy wanted" until May, 2005. *Tr at 17*. At that point he stopped drinking and undertook rehabilitation under the supervision of a professional.

The Individual's spouse confirmed that he had stopped drinking in May, 2005, and undergone the substance abuse treatment program. She testified that the Individual had not experienced difficulty in abstaining from alcohol since he quit in May, and would not in the future. She explained that their accomplishments and responsibilities, in terms of education and professional advancement, and their family did not allow much time for alcohol abuse. *Tr at 25-39*.

The second witness was an operations team leader who works with the Individual and who socializes with the Individual and his family. He has also known the Individual since they were in the Navy together, i.e., the time of the incidents specified in the Notification Letter. *Tr at 40-5*. Leaving aside their tenure in the Navy, he testified that he had never seen the Individual "intoxicated" and described the Individual's use of alcohol as "moderate." *Tr at 45-8*. He also testified that he and the Individual and their families had been together socially four or five times since May, 2005, and that the Individual had consumed no alcohol during those times. *Tr at 50*.

The final witness called by the Individual had been a supervisor for his present employer. He stated that he had never seen the Individual intoxicated or impaired in any way – including during non-working hours when the Individual had received unexpected calls to duty. This witness also testified to the Individual's excellent work habits and good judgment. *Tr at 71-6*.

The DOE psychiatrist testified that five months of abstaining from alcohol and approximately 24 hours of treatment was not sufficient to allow him to conclude that the Individual was rehabilitated and reformed. *Tr at 100-101*. The substance of the psychiatrist's testimony and accompanying colloquies with the Individual are that:

- five months of sobriety instead of the recommended two years of sobriety and
- 24 hours of treatment over four months versus a minimum of 50 hours over a period of 6 months is insufficient

Tr at 101-02.

In addition, the doctor testified to the effect that the Individual could have stopped drinking after the June, 2004 psychiatric interview. The Individual responded that he did not fully appreciate DOE concerns or know what he should do: "I was not made aware of your recommendations . . . until December of 2004." *Tr at 99*. The Individual also stated that he did not know what steps he should take until May, 2005, when he spoke with the first DOE Counsel assigned to this matter and stopped drinking. *Tr at 85-6*. Finally, because the Individual had referenced as a barrier the expense of treatment, the psychiatrist cited Alcoholics Anonymous as "an easy way to get a lot of exposure to alcohol issues."

In summary, it is fair to say that, in the opinion of the DOE psychiatrist, the Individual's progress and commitment – while good – fell well short of the period³ of abstinence where the doctor could conclude he was reformed and rehabilitated. *Tr at 101*. See, *Personnel Security Hearing, Case No. TSO-0253, 29 DOE para. 82,867 (2005) (21 months insufficient)*

IV. STANDARD OF REVIEW

Applicable DOE regulations state that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all the relevant information, favorable or unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). In resolving questions about the individual's eligibility for access authorization, I must consider the relevant factors and circumstances connected with the individual's conduct, set out in Section 710.7(c): the nature, extent, and seriousness of the conduct; the circumstances surrounding the conduct, to include knowledgeable participation; how recently and often the conduct occurred; the age and maturity of the individual at the time of the conduct; whether participation was voluntary; rehabilitation, reformation and other pertinent behavioral changes; the motivation for the conduct; the potential for pressure, coercion, exploitation, or duress; the likelihood of continuation or recurrence; and other relevant and material factors.

A DOE administrative review proceeding under 10 C.F.R. Part 710 is authorized when the existence of derogatory information leaves unresolved questions about an individual's eligibility for access authorization. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once DOE has presented derogatory information affecting an individual's eligibility for access authorization, the individual must come forward with evidence to convince DOE that restoring his

³ The Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association at 195-6 defines "sustained remission" as twelve months or more of abstinence.

or her access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." *See, e.g., Personnel Security Hearing* (Case No. VSO-0013), 25 DOE ¶ 82,752 at 85,511 (1995), and cases cited therein. The DOE regulations were amended in 2001 to state that any doubt regarding an individual's eligibility for access authorization shall be resolved in favor of the national security. 10 C.F.R. § 710.7(a).

V. OPINION

The steps the Individual has taken towards rehabilitation and reformation, if continued, may in time alleviate the DOE security concerns. If his efforts to date are enhanced as suggested by the DOE-sponsored psychiatrist during the Hearing, the DOE concerns expressed in the Notification Letter should be alleviated. Five months of abstinence and 24 hours of counseling, however, is not sufficient evidence of rehabilitation and reformation.

I have no doubt that the Individual's commitment is sincere. He appeared to me as a hard-working, goal oriented person who has voluntarily taken on and is dealing with other, very challenging aspects of his life that might otherwise hold him back emotionally and intellectually. For the concerns here, however, there simply has not been enough time.

There are a few other matters that I find troubling, such as the Individual's claim that he did not know what steps to take to alleviate the DOE concerns even after receiving the psychiatrist's evaluation. *Tr at 85* The evaluation and the doctor's recommendations vis-à-vis easing the DOE security concerns are quoted above and are quite clear. Any confusion may have stemmed from the Individual denying he had an alcohol problem; during the hearing the psychiatrist appeared to have that view. One way or another, a longer period of sobriety would have been recorded if the plain language of the report had been followed.⁴

Balancing all this against the important interests of national security, I cannot at this time conclude that the Individual is sufficiently rehabilitated and/or reformed as to resolve the DOE security concerns.

VI. CONCLUSION

⁴ The Individual also points to limited resources, family and educational obligations, together with the cost, as obstacles to additional alcohol treatment. The psychiatrist spoke to one aspect of this, i.e., notwithstanding philosophical difficulties with AA (*Tr at 96*), it does provide exposure to alcohol issues and it is without cost. *Tr at 103* For my own part, I was also struck by the contrast between the assertions of limited resources and the Individual's purchase of a jet ski made sometime after May, 2005. *Tr at 27* I appreciate the implicit explanation for the purchase – that the item provided an activity in lieu of those possibly involving alcohol – but the purchase does undercut claims as to limited resources.

The Individual has not resolved the Criteria J concerns set forth in the Notification Letter. Therefore, I cannot conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I have concluded that the Individual's access authorization should not be restored.

Richard T. Tedrow
Hearing Officer
Office of Hearings and Appeals

Date: January 24, 2006